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IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

BY: _____
DEPUTY CLERK

UNITED STATES OF AMERICA,
Plaintiff,

vs.

VAUN PERMANN,
Defendant.

OPINION AND ORDER
GRANTING UNITED STATES'
MOTION TO EXCLUDE
DEFENDANT'S EXPERT
WITNESS

Case No. 2:03-CR 86 TS

This matter came before the court on February 4, 2004, for hearing on the United States' Motion to Exclude Defendant's Expert Witness.

The United States moves to exclude Defendant's expert's report as not relevant to the charged crime. In the alternative, the United States requests a *Daubert*¹ hearing to determine the admissibility of the expert's opinions under Fed. R. Evid. 702.

¹*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993) (trial court to perform gatekeeping inquiry under Fed. R. Evid. 702 to ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable).

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Defendant is charged with one count of possession of a firearm by an unlawful user of a controlled substance, in violation of 18 U.S.C. § 922(g)(3).² Defendant's expert is Dr. Robert K. Rothfeder, M.D., an emergency physician. He opines that Defendant does not abuse marijuana and is not addicted to marijuana. Pl.'s Ex. A. The United States contends that Dr. Rothfeder's opinion is not relevant to the charge of possession of a weapon by an unlawful user of the controlled substance marijuana, because abuse and addiction are not elements of the charge.

In response, Defendant contends that his expert's opinion is relevant because this court should adopt and apply the following construction of "unlawful user" for purposes of 18 U.S.C. § 922(g)(3):

Giving the term a narrow construction, we hold that an "unlawful user" is one who uses narcotics so frequently and in such quantities as to lose the power of self control and thereby pose a danger to the public morals, health, safety, or welfare. In other words, an 'unlawful user' is someone whose use of narcotics falls just short of addiction, as that term is defined in the Controlled Substances Act.

U.S. v. Herrera, 289 F.3d 311, 323-4 (5th Cir. 2002) (underlined emphasis added). Dr. Rothfeder's opinion is expressed in terms of this Fifth Circuit definition of unlawful user and employs the terms, underlined above, from *Herrera*.

The United States notes that the *Herrera* case is not controlling authority in this jurisdiction and contends that the Tenth Circuit has stated the "unlawful user" does not mean "addicted to a controlled substance," because "the words 'unlawful user of or

²Defendant is also charged with one count of attempted manufacture by cultivation of marijuana in violation of 21 U.S.C. § 846 and 841(a)(1).

addicted to any controlled substance' are written in the disjunctive, implying each has a separate meaning." *U.S. v. Bennett*, 329 F.3d 769, 776 (10th Cir. 2003).

The United States is correct that, while the Indictment contains the disjunctive phrase "possession of a firearm by an unlawful user of or person addicted to a controlled substance" in its title, because only possession by an unlawful user is charged in Count I, only that issue can be sent to the jury. Therefore, Dr. Rothfeder's opinion that Defendant is not an addict is not relevant because addiction is not a fact issue to be determined by the jury.

While *Bennett* is not directly on point because it construes § 922(g)(3)'s phrase "unlawful user of or addicted to" for the purpose of application of the sentencing guideline which incorporates § 922(g)(3)'s definition, *Bennett* does show the Tenth Circuit's plain reading of the statute. The court finds that *Herrera* is not controlling authority and, further, finds that its reasoning for developing its definition of "unlawful user" is unpersuasive. In the absence of express authority from Tenth Circuit following *Herrera*, this Court will not re-write § 922(g)(3) to add the language developed in *Herrera*. Instead, the court finds that under Tenth Circuit law, § 922(g)(3) requires a showing of a defendant's drug use contemporaneously with a firearm possession, or in other words, a temporal proximity between use and possession. *Bennett*, 329 F.3d at 777 n.4. Any further disputes over the construction of § 922(g)(3) will be addressed in the context of a jury instruction conference.

Because it does not relate to any issue in the case, Dr. Rothfeder's opinion is not "scientific, technical, or other specialized knowledge" that "will assist the trier of fact to understand the evidence or to determine a fact in issue," within the meaning of Fed. R. Evid. 702. Accordingly, the court will grant the United States' Motion to exclude his expert testimony and report. It is therefore

ORDERED that the United States' Motion to Exclude Expert Witness is GRANTED.

DATED this 23rd day of February, 2004.

BY THE COURT:



TED STEWART
United States District Judge

jmr

United States District Court
for the
District of Utah
February 23, 2004

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:03-cr-00086

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

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